U.S. Department of Labor

Office of Administrative Law Judges
Heritage Plaza Bldg. - Suite 530
111 Veterans Memorial Blvd
Metairie, LA 70005

(504) 589-6201
(504) 589-6268 (FAX)

Date: May 4, 2000

Case No: 1999-LHC-2204

OWCP No: 07-149949

In the Matter of:

GARY LOUVIERE,
Claimant

vs.

GULF CRAFT, INC.,
Employer,

and

LOUISIANA WORKERS' COMPENSATION CORPORATION,
Carrier.

APPEARANCES:

CRAIG A. DAVIS, ESQ.
On behalf of the Claimant

TED WILLIAMS, ESQ.
On behalf of the Employer

Before: LARRY W. PRICE
Administrative Law Judge

DECISION AND ORDER-AWARDING BENEFITS

This is a claim for benefits under the Longshore and Harbor Workers' Compensation Act (herein the Act), 33 U.S.C. § 901, et seq., brought by Gary Louviere (Claimant) against Gulf Craft, Inc. (Employer) and Louisiana Workers' Compensation Corporation (Carrier). A formal hearing was

held in Lafayette, Louisiana, on February 15, 2000. All parties were afforded a full opportunity to adduce testimony, offer documentary evidence and submit post-hearing briefs.[1]

Based upon the stipulations of the parties, the evidence introduced, and the arguments presented, I find as follows:

I. STIPULATIONS

During the course of the hearing the parties stipulated and I find as related to Case No. 1999-LHC-2204 (JE-1):

1. Jurisdiction of this claim is under the LHWCA, 33 U.S.C. §901 et seq. (Tr. 80-81).

2. Date of injury/accident: Claimant alleges an accident on May 26, 1997.

3. Injury occurred within the course and scope of the employment: Disputed.

4. Employer/Employee relationship existed at the time of the accident: Yes.

5. Employer timely advised of the injury: Disputed.

6. The Notice of Controversion (LS-207) filed: September 18, 1998.

7. Average weekly wage at the time of the injury: $380.00.

8. Nature and extent of disability: Disputed
   a) Temporary Total Disability: Disputed.
   b) Temporary Partial Disability: Disputed
   c) Total Compensation Paid: None paid.
   d) Medical benefits paid: None paid.

9. The date of maximum medical improvement: Disputed.

10. After Claimant's disputed 5/26/97 accident, he continued to work for Gulf Craft as a fitter/tacker until 8/8/97 at which time he was terminated. He was rehired as a fitter/tacker on 8/18/97 and again terminated on 9/10/97. He was again rehired as a fitter/tacker on 12/8/97 and was terminated on 2/13/98. Thereafter, Claimant went to work for Scully's Aluminum Craft as a fitter from 4/1/98 to 4/16/98.

II. ISSUES

[1] References to the transcript and exhibits are as follows: Transcript - Tr. ___; Claimant's Exhibits - CX.___, p.___; Employer's Exhibits - EX. ___, p. ___; Joint Exhibits - JE. ___.

1. Causation.

2. Nature and extent of disability.

3. Entitlement to medical benefits.

III. STATEMENT OF THE CASE

Testimony of Frank Gary

Mr. Gary was Claimant's supervisor on the day of the accident. Their work-gang was in the process of launching a new crew boat when the cradle carrying the boat broke and the boat fell against another vessel. They had been moving the boat with a winch until the cable broke and someone suggested using a cherry picker to push the boat into the water. During the use of the cherry picker, the cradle broke and the boat fell four inches. Mr. Gary testified that he was not operating the cherry picker but was standing on the boat near the point where the cherry picker was pushing. As a result, he could not see how the other people onboard the boat reacted when it began tipping to one side. After the boat fell, he and the superintendent checked to see if everyone was all right. Mr. Gary testified that he neither witnessed Claimant leave the boat nor witnessed him on the ground afterwards. Mr. Gary disputed that he spoke with Claimant right after the boat fell. (Tr. 10-15).

Mr. Gary testified that Claimant had been terminated in February 1998, for chronic absenteeism. Claimant's absenteeism had existed prior to the accident. Mr. Gary indicated that Claimant was a fitter who would cut aluminum with a skill saw and tack it into place. Gibson 'Gippy' LaCoste was the yard superintendent. Mr. Gary did not have any knowledge of Claimant ever presenting Mr. LaCoste with a doctor's slip on or about February 13, 1998. (Tr. 15-19).

On cross-examination Mr. Gary was adamant that he neither witnessed Claimant climb onto the scaffolding nor fall from the scaffolding. Claimant never indicated to him that he was experiencing any physical discomfort or pain which would hamper his job performance. In his opinion, Claimant never had any problems performing his job so long as Claimant was actually at work. Neither at the time that Claimant left, nor when he was rehired, did he express any pain or physical discomfort to Mr. Gary. When asked about the process for reporting accidents, Mr. Gary indicated that injuries were reported to the supervisor who would report it to Bryan Tibbs in the stock room. Occasionally an employee would injure himself and not report it because he felt he could shake off the pain. (Tr. 19-27).

Claimant's Testimony

Claimant completed the eleventh grade prior to becoming a laborer. Since leaving school he has worked as a warehouse employee, a commercial fisherman and a fitter. Claimant worked at Gulf

Craft for four months in 1994. He was rehired by them in 1997 and was supervised by Frank Gary and Gippy LaCoste.

On the day of the accident, Claimant's group was launching a new crew boat hull. The winch broke and a cherry picker was used to move the boat. While using the cherry picker, the cradle the boat rested on collapsed causing the boat to fall against an adjacent upside down hull. Claimant and Glen Delcambre were in the cabin of the boat as it fell. Claimant testified that they tried to get off the boat once it came to a rest. The normal access stairs had detached as the boat fell so Claimant climbed onto the adjacent hull. There was a makeshift scaffolding which had been welded to the surface of the hull. After crossing to the opposite side of that boat, Claimant fell when an unsecured board moved under him. Claimant testified that he fell 20-25 feet and landed on his feet. He had attempted to catch himself but was unable to find anything to hold onto during the fall. (Tr. 28-39). He came to rest against a wall and his back was scratched and bruised. (Tr. 136).

Following the accident, one of the first people to speak with Claimant was Mr. Gary. Claimant testified that he was the operator of the cherry picker and therefore was the closest person to Claimant after he fell. Claimant disputed Mr. Gary's testimony that he was neither the operator of the cherry picker nor had he spoken to Claimant after the accident. Claimant testified that he continued to work after his accident and did not associate his gradually developing medical problems with the accident. He did not seek medical treatment for nine months because he though he could shake off the fall. Over that time, he developed severe pain and muscle spasms in his neck and right shoulder. In part, Claimant was fearful that he was beginning to suffer from the same heart problems which had affected his mother, grandmother and grandfather. He had cared for his mother while she was ill and had missed work prior to the accident for this reason. After the accident, he missed work because his pain made it too difficult for him to move about. The only other accident which Claimant could remember was a motorcycle accident he suffered as a teenager in which he fractured his wrist. (Tr. 39-42).

Besides talking to Mr. Gary after the fall, Claimant spoke with Glen Delcambre, Tony Allemond, Jesse Westley and Mike Hensley. Claimant informed them that he was feeling all right and had no serious injuries. Claimant did not report the accident to Mr. Gary as he thought Mr. Gary already knew about the fall. At the time of the fall, Claimant could see Mr. Gary and assumed the reverse was also true. Claimant's understanding was that the supervisor was responsible for filing any accident reports. Claimant did not make the connection between the fall and his increasing pain until he was examined by Dr. Kruse. That examination revealed that his C5 and C6 vertebrae had been slammed together. (Tr. 43-48, 104).

Claimant was initially examined by Dr. Luquette on February 9, 1998, at Lafayette Charity UMC. Claimant had informed Mr. Gary that he was leaving work early to see the doctor. Claimant's girlfriend had insisted he get his pain checked out so he went to the local emergency room. At that point, Claimant was missing work because his pain was such that he was unable to get out of bed some days. Though Claimant did not always call in to say he was not coming to work, if he called he would talk to either Mr. LaCoste or his secretary. Claimant testified that Mr. LaCoste became

dissatisfied with Claimant missing so much work and at one point accused Claimant of having AIDs. On the days he did work, Claimant found it difficult to perform his duties. He was having to use his left hand for cutting metal or griping items for an extended period of time. Claimant could perform the work but it was very painful. Claimant testified that he informed both Mr. Gary and Mr. Hensley that he was experiencing difficulty performing his job. He informed them that he had pain and tingling in his neck, right shoulder and arm. Claimant testified that he never really made an issue of his back. He never told them that the pain was related to the fall because he did not realize the two were connected. (Tr. 48-54).

Claimant testified that he left Gulf Craft in August 1997, because of a mistake regarding his time card. Claimant came to work and could not find his time card because it had been placed behind another employee's timecard. When he did not see his time card, he assumed that he had been fired for missing work. Prior to the time card incident, Mr. LaCoste had warned Claimant that he was missing too much time and might be fired if he did not start coming to work on a more regular basis. Mr. LaCoste knew that Claimant was experiencing pain but told Claimant that he still needed to come to work. After Claimant failed to find his time card, he returned the company tools to Mr. LaCoste and left to find another job. Claimant returned on Friday of that week to get his pay check and Mr. LaCoste asked where he had been. Claimant explained that he though he had been fired. Mr. LaCoste informed him that he was mistaken but that company policy mandated that Claimant be suspended for three months. During the three months, Claimant worked for Southern Magic but had to miss the last two weeks because of his pain. Three months later Claimant returned to Gulf Craft and worked there until February 13, 1998. At no point did Claimant ever ask Gulf Craft to pay for his medical bills because he had not connected his medical problems with the fall. After Claimant was examined by Dr. Luquette in early February, he returned to work and tried to present Mr. LaCoste a doctor's note. The note indicated that he was to take some time off and then perform light duty. When he tried to present the note, Mr. LaCoste informed Claimant that he had already been terminated. The last day which Claimant worked for Employer was February 9, 1998. (Tr. 54-61, 137-138).

Claimant worked at Scully's for three weeks following his termination from Gulf Craft. He was paid $12 per hour and worked five days a week. The work day was from 7AM until 5PM. Claimant left Scully's because he was physically unable to perform his duties as a fitter. After the first three weeks, he was fired for missing too much work. (Tr. 87-88).

On February 9, 1998, Claimant was examined by Dr. Luquette at the University Medical Center (UMC) in Lafayette. Dr. Luquette was the emergency room doctor present when Claimant's girlfriend initially convinced him to seek medical care. In the time period between the accident and this first medical examination, Claimant suffered no further accidents. Neither Dr. Luquette nor his nurse inquired about any accidents which Claimant might have suffered recently. Claimant informed them that he had pain in his neck, right shoulder, right arm and lower back. Dr. Luquette had x-rays taken of Claimant's neck and shoulder which demonstrated that Claimant's C5 and C6 vertebrae had been pushed together. He informed Claimant that surgery would be needed to correct the problem. Dr. Luquette referred Claimant to Charity Hospital in New Orleans where he was examined by Dr. Haight, Dr. Kruse and Dr. Dow. Dr. Haight was of the opinion that Claimant's condition would prevent him from working at that time. Dr. Haight's diagnosis included spondylosis at L5/S1 which

is a degenerative disc disease that was aggravated by Claimant's fall. Claimant was also diagnosed with foraminal stenosis at C5/C6 as a result of the fall. Claimant had surgery on July 15, 1998, to repair the C5/C6 damage. This involved drilling new pathways for the nerves and the insertion of a plate to bind the vertebrae. (Tr. 43-46, 62-71).

Though he was not examined by Dr. Haight until March 2, 1998, he reported to Dr. Haight that he began feeling pain symptoms associated with his neck since May 23, 1997. Dr. Haight indicated on May 19, 1998, that Claimant was considered totally disabled from May 1997, through the present time. Drs. Kruse and Dow were in agreement that Claimant could not work because of the damage caused by the fall. Claimant was only examined once by Dr. Haight because the neck fusion was performed by Dr. Kruse who worked in the same department. After Dr. Kruse left the department, Claimant came under the treatment of Dr. Dow. Dr. Kruse was the physician who connected Claimant's fall with the damage present in his neck and back. He had inquired if Claimant had suffered any injuries and Claimant responded with the history of the fall. Dr. Kruse felt that the fall was the only possible explanation for the damage to Claimant's neck. Since the fusion performed on July 15, 1998, Claimant has regained the ability to turn his head, lift his arm and generally moves with a greater degree of ease. He continues to experience muscle spasms but testified that he feels much better than he did prior to the surgery. Dr. Kruse was of the opinion that the fall aggravated Claimant's preexisting lumbar degenerative disc problems. (Tr. 71-75, 81, 111, 146). On cross-examination Claimant agreed that he worked after the point he was deemed medically to be temporarily totally disabled. Dr. Haight had determined that Claimant should not have worked after May 1997, so he indicated that Claimant had been disabled as of the accident. (Tr. 169-170).

Claimant testified that he has experienced back pain on at least two other occasions. The first was in November 1993, after he picked up a 150 pound pan in a fish market. The second was in January 1995, while spending time with his children. Each time he went in for a single medical visit. Claimant testified that the problems he experienced subsequent to the fall were unlike any of his previous medical problems. (Tr. 91-93).

One of the doctors who examined Claimant after the accident was Dr. Kucharchuk. The examination was performed at the request of the Social Security Administration and all of the medical records are in their possession. Claimant testified that Dr. Kucharchuk found the wrist to have severe arthritis and had suffered a collapse. Claimant had reconstructive wrist surgery to correct the problem. (Tr. 42-43). Claimant had re-injured the wrist while attempting to arrest his fall. The wrist was operated on in November 1999, and a seven inch steel plate was inserted into the top of his hand. (Tr. 75-79).

Claimant applied for reinstatement with Employer following his neck surgery. He spoke with Mr. Tibbs who informed him that his old job would be available to him if he felt capable of performing it. Claimant testified that his conversation with Mr. Tibbs took place prior to having surgery on his wrist. Claimant does not feel that he would be physically able to handle the job following the wrist and neck surgeries. Claimant is scheduled to have surgery on his back after the formal hearing. He was unable to predict what effect that would have on his physical condition. He

continues to have muscle spasms and trouble with climbing. (Tr. 80-86).

On cross-examination Claimant disputed the correctness of the termination notice associated with his first termination on February 17, 1995. The notice indicated he left to care for his mother but Claimant indicated that he left voluntarily over a wage dispute. When asked about the witnesses to the fall, he indicated that if Mr. Gary had not seen the fall he at least heard about it. One witness, Tex, told Claimant he actually saw the fall and asked Claimant if he was alright. Tex has been unavailable for trial because he moved out of state and Claimant did not know how to locate him. (Tr. 95-103). Claimant testified that Glen Delcambre had been in the cabin with him during the launching. He followed Claimant onto the upside down crew boat hull; however, Claimant was unsure how close he was when Claimant fell. Claimant could not be sure whether or not Mr. Delcambre actually witnessed the fall but he was sure that he asked Claimant if he was alright after the fall. Claimant was certain that Mr. Gary witnessed the fall because Mr. Gary was looking out the door of the cherry picker at Claimant. After the fall, Mr. Gary came over and asked if he was alright and Claimant said that he had fallen but was alright. (Tr. 105-109).

Claimant testified that prior to the accident he missed work for a variety of reasons. Those reasons included taking his children to doctors' appointments, his mother's heart surgery and his bouts with bronchitis. After the accident, Claimant had trouble holding a welding gun, climbing and working in tight spaces. Claimant testified that he told Mr. Gary and Mr. LaCoste that he was having trouble with his right arm and shoulder but not that he was having trouble performing his job. He indicated that he had either directly told Jesse Westley or that Jesse had overheard Claimant complaining about his problems. Claimant felt that he was working 30% slower than he had prior to the accident. (Tr. 110-120).

Claimant found it very insulting that Mr. LaCoste accused him of having AIDs because of the amount of time he was missing. Because of that, he would not always call if he was not coming to work because of the pain in his neck and shoulder. Claimant testified that Mr. LaCoste knew of the accident but Claimant never actually told him about the fall. Claimant disputed the fact that he was fired on August 8, 1997. He testified that he left of his own free will. Claimant also contested another separation notice which indicated he was fired on February 20, 1998, when it was actually February 13, 1998. Claimant disputed that he applied for work at Southern Magic on September 23, 1997. He remembered applying and getting the job on August 7, 1997, which is the day he left Gulf Craft because of the time card mistake. Claimant acknowledged that he lied about not having neck, shoulder, arm or lower back pain on his application to Southern Magic because he needed the job. Claimant indicated that he thought the form was asking about surgeries which was why he only listed the broken wrist. (Tr. 121-130, 137).

When Claimant returned to Gulf Craft after his three month suspension, he told Mr. Gary that he was experiencing some medical problems and might need to get them checked out. At some later date he also mentioned it to Mr. LaCoste. On one occasion Claimant informed Mr. Gary that he was having problems holding large pieces of metal so a helper was assigned for the rest of that day. Claimant did not inform either man that his medical problems were a result of the fall because he still did not know of the connection. Claimant testified that he might have told Mr. LaCoste that he needed to go to a doctor but never asked for permission to be seen by a doctor. (Tr.131-135).

Claimant testified that he has no phobia about going to a doctor because of pain. The reason he waited so long to be examined was that he was in too much discomfort to get in his truck and drive to the hospital. Claimant indicated that he was too physically unstable to stand up on those days that he did not go to work because of pain. (Tr. 141-142).

Claimant testified that seven to eight months after the accident his neck and right shoulder were significantly more painful that his lower back. His back was diagnosed as having two vertebrae rubbing together so he was convinced that surgery was needed. He did not make loud complaints to the doctors about his lower back problems because he was "not the kind of whining man that every time [he] feel[s] a little pain, [he] complain[s] about it." He first noticed the back problem because he was feeling pain in his hip. At some point, one of his doctors informed him that he had lost 20-30% of his leg muscles to the combined trauma and spondylosis in his lower back. Claimant's wrist has hurt him ever since he had the motorcycle accident as a teenager. After the fall at work it started to swell. Because he has always had problems with swelling in the wrist, he did not automatically assume it was the fall which had caused the swelling. Claimant testified that he was not asked about any recent traumas to the wrist. (Tr. 148-159).

After Claimant's final termination, he worked at Scully's for about a month and at Cherry Siding for a week in May or June 1998. Claimant also collected unemployment benefits for three weeks. (Tr. 159-160).

Claimant testified that he was neither beaten up nor mugged at the Cypress Bayou Casino. He disputed that he came to work in a neck brace. Claimant stated that he had mentioned to Tony Allemond that he had been ripped off at the casino. Claimant then clarified his testimony to reflect that he lied about the event at the casino because he was covering for taking the day off. His story was that he had been jumped from behind and had his wallet stolen. Claimant had wanted to rest his back so he invented the casino problem as a way of taking the day off. He had been catching abuse from Mr. LaCoste regarding his absenteeism and therefore wanted a good reason to take the day off. Claimant indicated that Mr. LaCoste's statements were probably not meant to be harassment. Rather they were just the way Mr. LaCoste interacted with people. (Tr. 160-168).

Testimony of Taffeta Lynch

Ms. Lynch, Claimant's girlfriend, began living with Claimant in February 1997. In her opinion, Claimant's pain gradually grew worse after the fall. Initially, Claimant had tenseness in the neck and shoulder. Later, claimant could not turn his head or lift eating utensils with his right arm. She was in nursing school and informed Claimant that his symptoms could be consistent with a heart attack. She tried to get him examined but he resisted. Eventually he relented and was seen by Dr. Luquette. Ms. Lynch indicated that Claimant mentioned the fall to Dr. Luquette but the doctor did not inquire further about the accident. Prior to the fall, Claimant had occasional pain in his wrist but had never experienced neck or shoulder pain. Ms. Lynch had no knowledge of any event other than the fall which could have caused Claimant's symptoms. Claimant began missing work in June or July 1997 as a result the pain from the fall. She corroborated Claimant's testimony that he did not connect the accident and his pain until he was informed by his doctor. (Tr. 172-183).

Testimony of Tony Allemond

Mr. Allemond has been employed at Gulf Craft for 17 years as a fitter. He has known Claimant since Claimant started working for Employer; however, they worked in different departments. On the day the boat fell, he was on the back deck of the boat. He remembered staying on the boat until it came to a rest and then getting off after finding out what had happened. His memory of the events was a little unclear but he remembered getting off the boat by climbing onto the hull against which the crew boat had fallen. As he was going to the far side of the upside down hull, something got his attention and he looked down. Claimant was standing on the ground and informed Mr. Allemond that he had fallen while climbing down. (Tr. 184-187).

Claimant worked on the cabin area while Mr. Allemond worked on the exhaust and the rudder systems. He remembered Claimant missing a fair amount of time both before and after the accident. In 1999, Claimant stopped by his house and indicated that he was experiencing pain but Claimant never expressed that to Mr. Allemond while they were working at Gulf Craft. Mr. Allemond could not remember any other workers talking about Claimant's fall or any problems he was having with pain. (Tr. 187-189).

Mr. Allemond did not actually see Claimant fall and thought that Claimant was standing up by the time he spoke with him. He was sure that he had inquired as to whether or not Claimant was alright because Claimant indicated that he had fallen. He did not remember Claimant having any problems performing his duties after the fall. When asked who was driving the cherry picker, Mr. Allemond testified that it was his brother Johnny Allemond. Based on where the cherry picker was pushing the boat, Mr. Allemond did not think that his brother could have seen Claimant fall. Mr. Allemond remembered Claimant saying something about getting jumped at Cypress Bayou Casino. At the time, Claimant might have had some scratches or something on his neck. He later heard a rumor that Claimant was wearing a neck brace. (Tr. 189-194).

Testimony of Glen Delcambre

Mr. Delcambre has worked at Gulf Craft for 20 years and has been a rigger for the last 12 years. He was on the front deck of the crew boat when it tipped over. According to his recollection, he was the only person on the front deck of the boat at that time. Mr. Delcambre could not remember Claimant being on the boat during the launch. After the accident, Mr. Delcambre left the boat by climbing onto the other hull and going down the scaffolding. He was on the ground in three minutes but did not see Claimant. He does remember Claimant speaking with him during the next half hour and telling him that he had fallen. Mr. Delcambre was uncertain as to how much time Claimant had missed after the fall because he could not remember whether or not Claimant had even worked there after May, 1997. Mr. Delcambre conceded that "I don't remember May '97. I can't remember last week."(Tr. 195-198).

Having just testified that he could not remember May 1997, he reconsidered and stated that Claimant had missed a lot of work after May. He also remembered Claimant had been wearing a neck brace when he told Mr. Delcambre about getting jumped at the casino. Mr. Delcambre indicated that

Claimant had "a few scratches or something" on his neck after the casino incident. Mr. Delcambre had heard a rumor that Claimant had tried to stop a fight between two women. (Tr. 198-200).

On cross-examination Mr. Delcambre testified that he and Claimant worked on different parts of the boat. Because of that, he would not have any knowledge regarding Claimant's work abilities. Mr. Delcambre testified that Johnny Allemond was driving the cherry picker. (Tr. 200-203).

Testimony of Jesse Westley

Mr. Westley was working as a fitter for Gulf Craft when the crew boat tipped over. Mr. Westley was on the ground during the accident and had no idea who was on the boat. He was not near the launch area and did not see either Claimant's fall or anyone else climbing off the boat. He did not know Claimant had fallen until a few months prior to the formal hearing. Mr. Westley worked on hulls while Claimant worked on cabins. They rarely worked together and Mr. Westley does not remember Claimant complaining of pain. He remembered Claimant missing work after May, 1997, but did not know the cause. Mr. Westley confirmed that he heard a rumor about Claimant getting jumped at the casino. (Tr. 204-209).

Testimony of Gibson "Gippy" LaCoste

Mr. LaCoste has worked at Gulf Craft for 15 years and was the production supervisor in the back yard during the botched crew boat launch. Mr. Gary had been operating the winch while Mr. LaCoste was monitoring the launch from a yard boat in the bayou. If the launch had gone correctly, he would have moored the new crew boat with a buoy rope. Because the cradle had been in one place for too long, the winch was insufficient for the task of getting the boat moving. Therefore, a cherry picker was brought in to push the boat. Mr. LaCoste was unsure why the tracks gave way but he did witness the crew boat fall against another hull in the launch area. He testified that the crew boat tilted between eight and fourteen inches. Mr. LaCoste testified that Tony Allemond, Darren LeBlanc, Glen Delcambre and one other person whom he could not remember were on the boat as it was being launched. To the best of his knowledge, the fourth person was not Claimant. Mr. LaCoste agreed with other witnesses that Johnny Allemond was operating the cherry picker. Mr. LaCoste was not in a position to see if Claimant fell because of his position on the yard boat. (Tr. 210-215).

At no point did Claimant inform Mr. LaCoste either that he had fallen or that he was experiencing pain. He never noticed Claimant having any trouble performing his duties. He knew Claimant had missed a lot of work before and after the accident but was unable to say during which period he had missed more work. Though Claimant may have spoken with his secretary, he could not remember Claimant calling him on those days which Claimant did not come to work. He acknowledged that the messages did not always get transferred to him. He also conceded that Claimant may have called and he just forgot about the call. Mr. LaCoste had no recollection of Claimant stating he needed to see a doctor about his neck and arm. (Tr. 215-218).

In August 1997, Claimant was terminated for missing work and not simply put on suspension for three months. Claimant returned in December 1997, and was considered a good worker whose

only problem was an erratic attendance record. Claimant was terminated the final time on February 13, 1998. Mr. LaCoste remembered Claimant trying to give some kind of an excuse but he informed Claimant that the position was already gone. Mr. LaCoste testified that he likes to joke with the employees as a way of interacting. He did not feel that this would have constituted harassment. He testified that he remembered hearing the rumor about Claimant being mugged at the casino but never witnessed Claimant in a neck brace. (Tr. 218-226).

Mr. LaCoste testified that Claimant was terminated on February 13, 1998, but the last day that Claimant worked was February 9, 1998. Since no one had reported being injured in the boat launching, no accident report was ever filled out. He acknowledged that people do not always report accidents. In fact, Mr. LaCoste has failed to report some of his own work-related injuries. He further acknowledged that with 70 employees it was possible that he could forget a conversation he had with one of them. With no accident report to remind him, he would likely have sent the individual to the doctor's office thinking it was a household injury. (Tr. 226-237).

Testimony of Scotty Tibbs

Mr. Tibbs has worked for Gulf Craft for about 20 years. He was not working at Gulf Craft during May, 1997, but currently is the comptroller in charge of personnel records and other accounting. He agreed with the general testimony presented at the formal hearing regarding the launching accident. After going through Claimant attendance records, he testified that Claimant had missed slightly more days prior to the accident that after it occurred. He corroborated Mr. LaCoste's testimony that no accident report would have been filed if no employee reported being injured. Mr. Tibbs did not know how much Claimant was paid by unemployment, only that he had been paid. (Tr. 237-249).

IV. DISCUSSION

In arriving at a decision in this matter, it is well-settled that the fact-finder is entitled to determine the credibility of the witnesses, weigh the evidence, draw his own inferences from it, and is not bound to accept the opinion or theory of any particular medical examiner. Todd Shipyards v. Donovan, 300 F.2d 741 (5th Cir. 1962); Atlantic Marine, Inc. and Hartford Accident & Indemnity Co. v. Bruce, 666 F.2d 898, 900 (5th Cir. 1981); Banks v. Chicago Grain Trimmers Association, Inc., 390 U.S. 459, 467, reh'g denied, 391 U.S. 928 (1968). It has been consistently held the Act must be construed liberally in favor of the claimants. Voris v. Eikel, 346 U.S. 328, 333 (1953); J.B. Vozzolo, Inc. Britton, 377 F.2d 144 (D.C. Cir. 1967).

However, the United States Supreme Court has determined that the "true-doubt" rule, which resolves factual doubt in favor of the Claimant when evidence is evenly balanced, violates Section 7(c) of the Administrative Procedure Act, 5 U.S.C. Section 556(d), which specifies the proponent of a rule or position has the burden of proof. Director, OWCP v. Greenwich Collieries, 114 S.Ct 2251 (1994), aff'g, 9990 F.2d 730 (3rd Cir. 1993).

CAUSATION

Section 20(a) of the Act provides Claimant with a presumption that his disabling condition is causally related to his employment if he shows he suffered a harm and employment conditions existed which could have caused, aggravated or accelerated the condition. Gencarelle v. General Dynamics Corp., 22 BRBS 170 (1989), aff'd, 892 F.2d 173, 23 BRBS 13 (CRT)(2d Cir. 1989). Once Claimant proves these elements, the Claimant has established a prima facie case and is entitled to a presumption that the injury arose out of the employment. Keliata v. Triple Machine Shop, 13 BRBS 326(1981); Adams v. General Dynamics Corp., 17 BRBS 258 (1985). With the establishment of a prime facie case, the burden shifts to Employer to rebut the presumption with substantial countervailing evidence. James v. Pate Stevedoring Co., 22 BRBS 271 (1989). If the presumption is rebutted, the administrative law judge must weight all the evidence and render a decision supported by substantial evidence. Del Vecchio v. Bowers, 296 U.S. 280 (1935).

It is without dispute that Claimant has suffered injuries to his back, neck and wrist. The controversy centers on whether Claimant suffered these injuries at work or somewhere else. The answer to the controversy is largely dependent on the credibility of Claimant.

Claimant has asserted that he was injured during the launching of a new crew boat at Employer's facility. Employer contends that Claimant was injured at some location other than its facility as there was no accident report concerning the injury. Neither party disputes that during the launching of the crew boat a mishap occurred which resulted in the boat falling against an adjacent hull. Claimant testified that he was aboard the crew boat during the launch and left the tilting boat by climbing onto the adjacent upside down hull. He proceeded over the keel and was climbing down some scaffolding when an unsecured board slipped and he fell to the ground. He fell an estimated 20 to 25 feet and landed on his feet against a wall. During the fall, Claimant had banged his wrist badly while attempting to arrest his fall. Claimant testified that he was not the type of individual to cry over small injuries. He did not report the fall because he did not feel any pain he could not shake off and he felt that Mr. Gary was fully aware of the fall.

Claimant's credible testimony is supported by the testimony of Mr. Allemond, Mr. Delcambre and Ms. Lynch. Mr. Allemond testified that as he was climbing down the scaffolding, something drew his attention to the ground where he saw Claimant. Mr. Allemond felt that it could have been the sound of a board falling which drew his attention to Claimant. Claimant promptly informed Mr. Allemond that he had fallen but felt alright. Within 30 minutes of the boat accident, Claimant also told Mr. Delcambre he had fallen.

After the fall, Claimant gradually developed medical complications which he did not identify with the fall at work. He was treated by a variety of doctors in the Louisiana charity hospital network. Claimant testified that the various doctors involved in his care informed him that his condition was caused or aggravated by the fall at work. Ms. Lynch lives with Claimant and has some training as a nurse. She testified that he was not experiencing pain in his neck, shoulder or lower back until after the fall on May 26, 1997. Ms. Lynch was positive that Claimant had not suffered any other accidents outside of work which could have caused the injuries to this neck and shoulder. While there may be some confusion as to who was located where and who said what to whom, I find that Claimant's version of the events surrounding the accident to be credible and supported by the testimony of the witnesses just noted. I find Claimant has established a work-related accident on May

26, 1997, which could have caused his subsequent medical problems. Therefore, Claimant has established a prima facie case and is entitled to a presumption that the injury arose out of his employment at Gulf Craft, Inc.

Employer must produce substantial evidence to rebut the statutory presumption that "the claim comes within the provisions" of the Act. See 33 U.S.C. §920(a). That evidence must be "specific and comprehensive enough to sever the potential connection between the disability and the work environment." Parsons Corp. of California v. Director, OWCP, 619 F.2d 38 (9th Cir. 1980, aff'g, 6 BRBS 607 (1977); Butler v. District Parking Management Co., 368 F.2d 682 (D.C. Cir. 1966); Ranks v. Bath Iron Works Corp., 22 BRBS 301, 305 (1989).

In order to refute Claimant's assertion that his medical condition stems from a work-related event, Employer has introduced the testimony of several of Claimant's co-workers and supervisors. It is Employer's contention that Claimant did not suffer a work-related accident on May 26, 1997. Mr. LaCoste testified that he did not think Claimant was on the crew boat during the launch; however, he also testified that he was unable to remember who the fourth member of the launch crew was. During the launch he was on the bayou where he could not see the events on the crew boat. Mr. Gary testified that he had been operating the winch until it broke and then he was on the front deck of the boat. This is contested by Claimant who felt that Mr. Gary was driving the cherry picker. Also, Mr. Delcambre testified that he was the only person on the front deck of the crew boat during the launch. In both cases, there is an element of doubt because other workers remembered Mr. Allemond's brother driving the cherry picker and Claimant testified that Mr. Delcambre was in the boat's cabin. Mr. Delcambre testified that he has significant memory problems which lay doubt as to the accuracy of his recollection.

Mr. Gary testified that from his location on the front of the boat he could not see any of the other launch crew members. He was Claimant's immediate supervisor and did not dispute that Claimant was a member of the launch crew; however, he neither saw Claimant leave the boat nor fall from the scaffolding.

I find that the testimony in support of Employer's assertion fails to overcome the Section 20(a) presumption. Mr. LaCoste could not remember who the fourth member of the launch crew was and could not see them from his location. Mr. Gary did not refute the fact that Claimant was on the boat. He stated that he was not driving the cherry picker and did not speak with Claimant after the accident. Mr. Gary further indicated that he could not have witnessed the fall because of his location. Therefore, his testimony fails to conform to either Claimant or Mr. Delcambre's recollections. Mr. Delcambre testified that Claimant told him of the accident right after it happened and that Mr. Gary was not with him on the front of the boat. I fail to find that this evidence is successful in either clearly establishing the location of Claimant's co-workers or refuting his credible testimony regarding the accident. Therefore, I find that Claimant's Section 20(a) presumption survives Employer's challenge and Claimant has successfully established that his injuries were caused by a work-related accident on May 26, 1997. In summary, I believed Claimant's testimony that he fell from the scaffolding and that it was from this fall that his medical problems developed.

NATURE AND EXTENT

Having established an injury, the burden now rests with Claimant to prove the nature and extent of his disability. Trask v. Lockheed Shipbuilding Construction Co., 17 BRBS 56, 59 (1985). A claimant's disability is permanent in nature if he has any residual disability after reaching maximum medical improvement (MMI). Id. At 60. The date of maximum medical improvement is defined as the date on which the employee has received the maximum benefit of medical treatment such that his condition will not improve. The date on which a claimant's condition has become permanent is primarily a medical determination. Manson v. Bender Welding & Mach. Co., 16 BRBS 307, 309 (1984). The date of maximum medical improvement is a question of fact based upon the medical evidence of record regardless of economic or vocational consideration. Louisiana Insurance Guaranty Assoc. v. Abbott, 40 F.3d 122, 29 BRBS 22 (CRT) (5th Cir. 1994); Ballesteros v. Willamette Western Corp., 20 BRBS 184, 186 (1988); Williams v. General Dynamic Corp., 10 BRBS 915 (1979).

The record in this case contains no live or deposition medical testimony. The medical records provided from the various charity hospitals are limited to chart notes and operative notes with no amending explanation or detailed medical histories. The best evidence provided is Claimant's recollections of what certain doctors told him. Claimant is scheduled to have surgery on his back after the formal hearing. He was unable to predict what effect that would have on his physical condition. He continues to have muscle spasms and trouble with climbing. As such, I find Claimant's condition has not reached maximum medical improvement and I find that Claimant's injuries remain temporary in nature at this time.

The question of extent of disability is an economic as well as medical concept. Quick v. Martin, 397 F.2d 644 (D.C. Cir. 1968); Eastern S.S. Lines v. Monahan, 110 F.2d 840 (1st Cir. 1940). A claimant who shows he is unable to return to his former employment establishes a prima facie case for total disability. The burden then shifts to the employer to show the existence of suitable alternative employment. P & M Crane v. Hayes, 930 F.2d 424, 430 (5th Cir. 1991); N.O. (Gulfwide) Stevedores v. Turner, 661 F.2d 1031, 1038, 14 BRBS 1566 (5th Cir. 1981). Furthermore, a claimant who establishes an inability to return to his usual employment is entitled to an award of total disability compensation until the date on which the employer demonstrates the availability of suitable alternative employment. Rinaldi v. General Dynamics Corp., 25 BRBS 128 (1991).

Claimant testified that he does not feel that he would be physically able to handle his previous job following the wrist and neck surgeries. Considering the type of injury involved and in the absence of any medical opinion that Claimant can return to his usual employment, I find Claimant has established a prima facie case for total disability.

As there is no showing of maximum medical improvement or suitable alternative employment at this time, I find that Claimant is currently temporarily totally disabled.

In the medical opinion of Dr. Haight, Claimant has been disabled since the day he was injured. However, there is absolutely no explanation as to how Dr. Haight arrived at this conclusion. This also ignores the fact that Claimant's injuries got progressively worse and that he was able to continue working after the accident. Claimant continued to work for Employer from the date of the accident

until August 7, 1997, and missed no more work after the accident that before the accident. Claimant testified that he walked off the job because he thought he had been fired but, in fact, there had just been a mistake regarding his time card. He applied for and got a job with Southern Magic the same day. Later, Claimant returned to work for Employer. The first medical evidence that indicates Claimant could no longer perform his work as a fitter is the medical excuse from Dr. Luquette which restricted Claimant to light duty. Claimant testified that he then went to work for Scully's for three weeks where he made higher wages than he made at Employer's. Accordingly, I find that Claimant's disability started on March 2, 1998, the date he was no longer able to perform the work at Scully's and after Dr. Luquette had placed Claimant on light duty.[2]

SECTION 7 - MEDICAL EXPENSES

Employer is generally not responsible for the payment of medical benefits if a claimant fails to obtain the required authorization to change physicians. Slattery Assocs. v. Lloyd, 725 F.2d 780, 787 (D.C. Cir. 1984); Swain v. Bath Iron Works Corp., 14 BRBS 657, 664 (1982). Failure to obtain authorization for a change can be excused where the claimant has been effectively refused further medical treatment. Lloyd, 725 F.2d at 787; Swain, 14 BRBS at 664; Washington v. Cooper Stevedoring Co., 3 BRBS 474 (1976), aff'd, 556 F.2d 268 (5th Cir. 1977). Lack of prior authorization is not required when a claimant is referred to a specialist by his treating physician. Armfield v. Shell Offshore, 25 BRBS 303, 309 (1992).

As there are no contrary medical opinions contained in the record, Claimant is entitled to medical expenses associated with his neck, right shoulder, wrist and lumbar spine injuries which stem from his May 26, 1997 accident.

SECTION 14(J) CREDIT

Employer may have right to receive a credit towards future permanent partial disability payments, based on an overpayment of voluntary total temporary disability. Nicholls v. Sun Shipbuilding & Dry Dock Co., 8 BRBS 710, 712 (1978). Section 14(j) does not establish a right of repayment or recoupment for an alleged overpayment of compensation. Ceres Gulf v. Cooper, 957 F.2d 1199, 1208 (5th Cir. 1992). Employers credit is based on the total amount paid not the number of weeks paid. Hubert v. Bath Iron Works Corp., 11 BRBS 143, 147 (1979), overruled in part by Potomac Elec. Power Co. v. Director, OWCP, 449 U.S. 268 (1980).

The employer is entitled to a credit for payments made under a state compensation act. Garcia v. National Steel & Shipbuilding Co., 21 BRBS 314, 317 (1988). The employer may not

[2] This accords with Claimant's request that benefits be retroactive to the last day Claimant worked in February, 1988. (Claimant's Brief, page 11).

receive credit under Section 14(j) for wages received by Claimant from another employer. See carter v. General Elevator Co., 14 BRBS 90, 98 n.1 (1981).

ORDER

It is hereby ORDERED, JUDGED AND DECREED that:

1) Employer shall pay to Claimant temporary total disability from March 2, 1998, and continuing into the future based upon an average weekly wage of $380.00.

2) Employer shall pay Claimant, pursuant to Section 7 of the Act, for all of his reasonable and necessary medical expenses arising out of his May 26, 1997 work-related accident.

3) Employer shall pay all interest due on unpaid compensation as calculated by the District Director.

4) Counsel for Claimant, within 30 days of receipt of this Order, shall submit a fully-documented fee application, a copy of which shall be sent to all opposing counsel who shall have 20 days to respond with objections thereto.

5) All computation of benefits and other calculations which may be provided for in this Order are subject to verification and adjustment by the District Director.

SO ORDERED.

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LARRY W. PRICE
Administrative Law Judge